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In The

Supreme Court of the United States

October Term, 1979

No. 79-5602

FEODOR FEDORENKO,
Petitioner

Vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Feodor Fedorenko petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit, which reversed and remanded a judgment of the United States District Court for the Southern District of Florida, which entered judgment for the Petitioner in an action commenced by the United States of America to revoke the petitioner's naturalization.

OPINION BELOW

The opinion below is reported in 597 F.2d 946, and also appears as Exhibit B in the Appendix to this petition. The opinion of the District Court appears as Exhibit A.

The United States Court of Appeals, Fifth Circuit, reversed and on remand directed the District Court to enter judgment for

the United States, and to cancel the Petitioner's Certificate of Naturalization.

JURISDICTION

The Judgment below was entered June 28, 1979 (Exhibit B) Rehearing En Banc was denied August 15, 1979. Jurisdiction of this Court exists under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether proof of Materiality as required under 8 U.S.C. §1451 (a) and as set forth in *Chaunt* v. *United States,* 364 U.S. 350, 81S. Ct. 147 requires under the second standard that the Government must prove the existence of ultimate facts which would have warranted denial of citizenship and that disclosure of the suppressed or misstated facts might have led to the discovery of the ultimate facts.

2. Whether under Chaunt, the Petitioner's failure to disclose his presence during World War II, at the Treblinka Concentration Camp was a fact if known, that was sufficient to divest him of his citizenship.

3. Whether the United States District Courts have equitable powers to consider equitable and mitigating circumstances in a denaturalization proceeding as a basis for its holding and decision to deny denaturalization.

STATUTE INVOLVED

Section 340(a) of the Immigration and Nationality Act, of 1952, as amended (Act), 8 U.S.C. 1451(a), provided in part, as follows:

> "It shall be the duty of the United States Attorneys for the respective districts, upon affidavit showing good cause therefore, to institute proceedings in any Court specified in subsection (a) of Section 310 of

this title (Sec. 1421 of 8 U.S.C.) in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation..."

STATEMENT OF THE CASE

Petitioner was born in the Ukraine in 1907. On June 23, 1941, he was mobilized into the Russian Army along with the truck he drove for the State. Within three weeks of the date of mobilization, he was captured by the German Army, Appendix B8, 9. After his capture he was transported from the Ukraine first to Zytomer, then to Rovno in the Ukraine, then to Chelm, Travnicki, Lublin, Warsaw, Treblinka, back to Travnicki, Poland then to Poelitz and to Hamburg, Germany, all during the period of 1941 to 1945. Appendix B. Through most of this time period the Petitioner was forced to act as a guard under the direction and control of the German Army. (Appendix 39a).

At the end of the World War II, the Petitioner worked for British Occupation Forces from 1945 to 1949. Appendix B32. When the Petitioner registered with the British he listed his birthplace as Sarny, Poland, and his nationality Polish-Ukrainian to avoid forced repatriation to the Soviet Union. (Appendix 32a, 33a).

While at the displaced persons camp at Osdorf near Hamburg, the Petitioner applied for immigration to the United States. He stated his birthplace was Sarny, Poland, his occupation farmer until March 1942, when he was deported to Germany to work at Poelitz. (Appendix 33a).

The Petitioner's application for a visa was executed on October 12, 1949, by United States Vice-Consul Ralph G. Clark at Wentorf near Hamburg. (Exhibit E). Thereafter, the Petitioner arrived in the United States at Boston, Massachusetts on November 5, 1949.

On November 21, 1950, the Petitioner executed an Application for a Certificate of Arrival and Preliminary Form for a Declaration of Intention, wherein he declared he was born in Sivash, Ukraine. (Exhibit F).

Thereafter, the Petitioner applied for Naturalization on October 4, 1969, and on April 23, 1970 he was issued a Certificate of Naturalization. (Exhibits G and H).

On August 15, 1977, the United States Government commenced denaturalization proceedings against the Petitioner under 8 United States Code 1451(a).

The complaint alleged in Count 1 that the petitioner gave false information in his application for Immigration Visa as to his birthplace and places of residence.

Count 2 alleges the Petitioner committed crimes or atrocities against civilians at Treblinka Concentration Camp in Poland, and he was therefore not a displaced person under the Displaced Person Act and not eligible for immigration to the United States.

Count 4 alleges the Petitioner wilfully failed to disclose the commission of crimes at Treblinka in response to question #6 on Form N-400.

Count 5 alleges the Petitioner wilfully failed to disclose his service as an armed guard for the Germans in response to question #7 on Form N-400.

Counts 6 and 7 allege the defendant lacked good moral character required to become a citizen by commission of atrocities at Treblinka and giving false statements with request to Questions #6 and 7 on Form N-400.

The case was tried before Judge Norman Roettger in the United States District Court, Southern District of Florida and the Court issued its decision on July 25, 1978, (Exhibit A),

United States v. *Fedorenko,* 455 F. Supp. 893 (1978). The Court found the Government did not meet its burden of proof as to all counts of the complaint. (Appendix 46a, 47a, 48a).

The District Court further found the Petitioner was a prisoner of the German Army and was forced into involuntary guard duty. (Appendix 11a, 12a, 39a).

The Court did find that the Petitioner lied on his Immigration Application when he gave his birthplace as Sarny, Poland, and stated he worked in a factory in Poelitz, Germany. (Appendix 41a).

The District Court held that the misrepresentation was not material as to nationality or birthplace, and would not have denied him citizenship, (Appendix 42a), nor would the disclosure of these facts have been useful in an investigation leading to the discovery of other facts which might possibly result in a denial of citizenship. (Appendix 43a).

The Court then considered the materiality of the Petitioner's mistrepresentation of his whereabouts from 1942 to 1945. The District Court found the Petitioner's disclosure of his presence at Poelitz, whether as a forced laborer or a prisoner-guard, would or should have prompted an investigation of records into the Petitioner's background. (Appendix 43a, 46a).

The Court found the Government failed to show that an inquiry had been made in response to information which should have prompted an inquiry. (Appendix 46a).

The District Court specificially held the Petitioner lawfully entered the United States and found for the Petitioner on Counts 1, 2, 3 and 4. (Appendix 47a).

The District Court further held, the Government failed to meet its burden of proof as to Counts 6 and 7 and found the Petitioner had not wilfully deceived the Government. (Appendix 48a).

The Government's witness as to Policy and Procedures of Vice-Consul in administering the Displaced Persons Act was Kempton Jenkins, who served as Vice-Consul in Munich, Germany from March 12, 1951 for about eleven months.

The District Court weighed the testimony of Jenkins in light of the other testimony of witnesses and the Petitioner. (Appendix 35a).

The District Court found numerous inaccuracies in his testimony. (Appendix 35a). While the witness's testimony was informative as to the general procedures followed while he was in Germany, it did not establish what policies or procedures were employed at the time the Petitioner applied for his Visa in 1949.

The District Court rejected Mr. Jenkin's definition of Voluntary and found that the Petitioner did not act ina voluntary way while a prisoner under the German Army (Appendix 39a).

The Government failed to produce as a witness Vice-Consul Ralph G. Clark, who processed the Petitioner's visa, leaving in doubt many questions as to what occurred in 1949. (Appendix 46a).

The District Court's decision that the Government failed to prove that the concealed facts would have denied Fedorenko citizenship was based on a finding of the following facts:

a. Fedorenko's guard duty was involuntary; (Appendix 11a, 37a, 39a).

b. the testimony of Kempton Jenkins contained inaccuracies and was therefore considered in the light (of) all the evidence; (Appendix 35a).

c. Fedorenko lied when he gave his birthplace as Sarny, Poland and stated he worked in a factory in Poelitz, Germany; (Appendix 41a).

d. the True facts of Fedorenko's birthplace and nationality would not justify denial of citizenship; (Appendix 42a) the disclosure of those facts would not have been useful in an investigation leading to discovery of other facts possibly warranting denial of citizenship; (Appendix 43a).

e. if the Treblinka term had been known to Vice-Consul processing Fedorenko's visa it would have prompted an investigation to determine if Fedorenko committed atrocities at Treblinka or served voluntarily as a guard; (Appendix 43a).

f. the government did not produce the Vice-Consul who processed Fedorenko; (Appendix 35a).

g. the Vice-Consul would have to decide whether to admit the applicant and would give the benefit of the doubt to the applicant, the tendency being to make a favorable judgment; (Appendix 36a).

h. the knowledge of Fedorenko being at Poelitz whether as a forced laborer or a prisoner-guard would have triggered an inquiry or search of records; (Appendix 43c).

i. Fedorenko did not mention Treblinka in his history to the Displaced Persons Commission, he did mention his service at Poelitz. Although the information should have triggered an inquiry, there is no mention of it; (Appendix 45a, 46a).

j. the doubt as to whether there was an inquiry as to the mention of Poelitz or whether ther would have been an inquiry as to it and Treblinka was resolved in favor of the defendant; (Appendix 46a).

k. the Court found the Government failed to prove the commission of any crime; (Appendix 46a).

l. Fedorenko had strong reason to view himself as a prisoner of war and not an armed guard for the Germans; (Appendix 47a).

m. Fedorenko's good conduct for 29 years is uncontroverted, while the evidence of his conduct at Treblinka is fraught with conflict and uncertainty and inconclusive; (Appendix 48a).

n. the Government did not meet its burden of proof as to Counts 1, 2, 3, 4, 5, 6, 7; (Appendix 46a, 47a, 48a, 54a, 55a).

o. the Equities demand that due consideration be given to Fedorenko's 29 years as a responsible citizen and the inconclusiveness of the record as to his conduct 35 years ago, and that equity requires judgment for Fedorenko. (Appendix 55a).

The Government appealed the decision of the District Court to the United States Court of Appeals, Fifth Circuit, claiming five questions of error. The Court of Appeals considered only three challenges to the lower Court ruling.

First, the Government asserted the Petitioner's own admissions indicate his naturalization resulted from material misrepresentation and concealment.

Second, it claims the District Court erred in its rejection of testimony by several survivors of Treblinka.

Third, the Government claims the District Court erred in holding equitable considerations would serve as an alternate basis for its judgment for the defendant. (Appendix 59a).

The Court of Appeals, however, did not consider the second challenge which was the District Court's rejection of the testimony of the Treblinka survivors in reversing the decision of the lower court and remanding for directed judgment on behalf of the Government. (Appendix 65a).

Thus, the Court of Appeals, Fifth Circuit, decided two questions:

1. Did the Petitioner's naturalization result from material misrepresentations and concealment; and

2. Did the District Court err in hold equitable considerations would serve as an alternative basis for judgment for the Petitioner.

The Court of Appeals first addressed, as an important question, the standard to be applied to the materiality of a misrepresentation by nondisclosures in an action for revocation of citizenship. (Appendix 58a). This Court held the District Court erred as a matter of law, and that it is necessary to prove only that facts which the Petitioner misrepresented might, if disclosed, have led to the discovery of other facts which would have justified denial of citizenship. (Appendix 58a).

The Court of Appeals stated the District Court erred as a matter of law as to the standard to be applied to the materiality of a misrepresentation by nondisclosure and further erred in its alternative holding on equitable grounds. (Appendix 58a, 65a).

The Court of Appeals stated:

> "It was not necessary the the Government prove the existence of facts which, in and of themselves, would have justified denial of citizenship. It is necessary to prove only that the facts which the defendant admittedly misrepresented might if disclosed, have led to the discovery of other facts which would have justified denial of citizenship." (Appendix 58a).

The Court of Appeals reversed the decision of the District Court and remanded that said Court revoke the Petitioner's citizenship.

The Court of Appeals based its finding on the testimony of Kempton Jenkins, and held that the Petitioner obtained his citizenship by misreprentation and concealment of his whereabouts during the war years and his service as a Concentration Camp guard. (Appendix 65a).

The Appelate Court disagreed with the District Court's findings as to the weight that should be accorded the testimony of Kempton Jenkins, and found as a fact, which is the direct basis for its decision, that the American Authorities *would* have conducted an investigation which might have resulted in a denial of a visa if the Petitioner revealed his guard service. (Appendix A 64a).

The Court also found that the District Court lacked Equitable Powers in a denaturalization proceeding to consider an alternative equitable judgment for the Petitioner.

REASONS FOR ALLOWING THE WRIT

1. Conflict Of Appellate Court Decisions.

There are conflicting decisions at the Appellate Court level as to what is meant by the second standard of the test of materiality in the case of *Chaunt* v. *United States* (1960), 364 U.S. 350, 81 Sct. 147, 5 L. Ed. 2d 120.

The Supreme Court held in the case of "Chaunt" that:

"The Government has failed to show by clear, unequivocal and convincing evidence" either (1) that facts were suppressed which, if known, would have warranted denial of citizenship, or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship. Chaunt, Supra, 355.

Since that decision in 1960, there has been only one Supreme Court decision on the test to be applied to determine the materiality of a misrepresentation, and that was in the case of *Costello* v. *United States,* 365 U.S. 265 (1961).

In that decision the Court found that the suppressed facts in and of themselves justified denial of citizenship. Costello, supra, 272.

To date, there has been no Supreme Court decision involving the application of the second test or standard, although this important question was raised below in Appellate Court decisions:

In the case of *United States* v. *Rossi,* 299 F2d 650 (9th Circuit 1962) the court considered on appeal whether Rossi, who concealed his true identity by impersonating his brother who was a Chilean citizen, to avoid quota restrictions on Italians, committed a material misrepresentation that should revoke his citizenship. The Ninth Circuit Court's holding was that the Government must prove the existence of ultimate facts which would have justified the denial of citizenship.

In quoting from United States, ex rel. *Fink* v. *Reimer,* 96 F.2d 217 (2 Cir. 1938), the Court in "Rossi" said:

A fact suppressed or misstated is not material to an alien's entry, *unless* it is one which, if known, would have justified a refusal to issue the visa. (emphasis supplied). Id at 652.

The "Rossi" Court in effect found the Government had not shown that the misrepresentation would have resulted in a denial of an Immigration Visa because the ultimate and underlying fact, the true identity of Rossi, had not been shown to justify denial of citizenship.

Subsequently, in the case of *La Madrid Peraza* v. *Immigration and Naturalization Service,* 492 F 2d 1297 (9th Cir. 1974) also a deportation case, that Court held that a suppressed fact is not material unless the truth would have justified a denial of an Immigration Visa.

The Fifth Circuit Court of Appeals has reached a holding which substantially differs with that of the Ninth Circuit Court

of Appeal's decisions in the "Rossi" and "La Madrid Peraza" cases.

The Fifth Circuit has held that "the Government need only prove by clear and convincing evidence that disclosure of the true facts would have led the Government to make an inquiry that might have uncovered other facts warranting denial of citizenship." *United States* v. *Fedorenko,* 597 F. 2d 946 (5th Circuit 1979).

The decision of the Ninth and Fifth Circuit Courts clearly are in conflict as to the standard or requirements of proof as to the second test or standing in "Chaunt."

2. The Question Of Materiality.

a. Conflict of Decisons.

While the Supreme Court decision in "Chaunt" requires clear, unequivocal and convincing evidence of a material misrepresentation, a substantial question exists as to the burdern of proof as to the standards of "Chaunt" and as to how the burden of proof is satisfied. The conflict mentioned as to the Appellate Court rulings on the second standard in "Chaunt" points out the question of what must be proved to satisfy the second standard in "Chaunt".

In addition, what proof is acceptable in establishing the materiality or compliance with the language of "Chaunt" is also at issue.

b. Clear, Convincing And Unequivocal Evidence Requirements.

The Government attempted to establish through the testimony of a former Vice-Consul whose service began in 1951, approximately two years after the Petitioner's application for Immigrant Visa was submitted to the Vice-Consul at Wentorf,

Germany, that the Petitioner would have been denied an Immigrant Visa if he had disclosed facts about his presence at Treblinka.

Admittedly, the witness Kempton Jenkins, who testified as an expert witness, did not know, or have any contact with, the Vice-Consul at Wentorf who processed the Petitioner's Visa in 1949.

The Government did not establish the identity of the Vice-Consul at Wentorf.

Neither did it prove by clear, convincing and unequivocal evidence the Vice-Consul processing the Petitioner's Visa had any knowledge of Treblinka, that he would have ordered an investigation if known, and if revealed by the Petitioner that the term Poelitz was known to him, and would have prompted an investigation, and that had the Petitioner revealed his guard duty under claim of involuntary duty, he would have granted or denied the Visa, as might be his discretion.

The Supreme Court has placed the same burden of proof on the Government under both standards or tests in "Chaunt," which requires "clear, convincing and unequivocal proof which does not leave the issue in doubt." Chaunt id.; *Schneiderman* v. *United States,* 320, U.S. 118, 125, 158; *Baumgarter* v. *United States,* 322 U.S. 665, 670.

The Supreme Court further stated in Chaunt quoting from *Baumgarter* v. *United States,* supra 671, "we deal with 'judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship.'"

The question at hand is whether the testimony of Kempton Jenkins which is circumstantial, based in part on hearsay and in part on personal experiences in administering the Act, could be accepted to show the state of mind of a Vice-Consul whom he never knew or had any personal knowledge of?

Does not the testimony of Mr. Jenkins have little probative value in the absence of corroborative evidence or direct evidence which would establish the guidelines in 1949, the personal knowledge and manner in which the Vice-Consul at Wentorf processed the Fedorenko Visa that day of October 12, 1949. *United States* v. *Oddo,* 314 F2d, 115 (2nd Cir. 1963).

The Fifth Circuit Court of Appeals disregarded the weight the District Court gave the testimony of Kempton Jenkins and found facts rejected by the District Court. *United States* v. *Fedorenko,* Id. 952, 953. (Appendix 65a).

In *United States* v. *Oddo,* Id. 117, the Second Circuit Court stated:

Testimony as to custom and practice is admissable as circumstantial evidence, subject to the usual condition that its probative value outweighs any possible impact.

The Fifth Circuit of Appeals, apparently substituted its judgment for that of Judge Roettger as to the weight to be given the Jenkins testimony, in opposition to its ruling in the case of *Vasquez-Mondragon* v. *Immigration and Naturalization Service,* 562 F 2d 1225 (5th Cir. 1977) wherein it held at page 1226 that it was not "permitted to substitute our judgment for that of the Board or the (Judge) with respect to the credibility of this testimony or the ultimate findings of fact based thereon."

3. The Alternative Basis For The Holding Of The District Court-Equitable Considerations

The District Court's decision of 54 pages contained an alternative basis for its holding, stating the equities of the case demand judgment for Fedorenko. (Appendix 49a, 54a).

The issue would appear to be one of first impressions for the Supreme Court as to the discretion of the District Court to consider an equitable basis for its handling in a denaturalization proceeding commenced many years after entry to the United States. (Appendix 52a).

There is no question that a denaturalization proceeding is a suit in equity. *Knauer* v. *United States,* 328 U.S. 654.

The District Court's decision states that in light of the uncertainty of the Petitioner's conduct 35 years ago, and his 29 years of good citizenship, all doubts, uncertainties and questions which have not been resolved unequivocally, should be resolved equitably in favor of the Petitioner. Thus, the District Court considered its equitable powers as authority to find an equitable basis for its holding not inconsistent with its holding that the Government failed to meet its burden under Chaunt. (Appendix 54a, 55a).

Sound reasoning requires that a reading of Chaunt when applied to this case imposes upon the Government the burden of proof that requires complete proof of all issues in dispute by clear, convincing and unequivocal testimony, that testimony of an expert which is circumstantial and not based on facts as to his opinions, inferences or conclusions should be rejected or limited.

As the Fifth Circuit Court of Appeals noted in a 1974 decision fo *Stanall* v. *McKenzie Tank Lines, Inc.* (5th Cir. 1974), 497 F2d 529, "An expert must be in possession of sufficient proved facts to enable him to express a reasonable accurate conclusion, and the facts upon which he bases his opinion must be disclosed..." The Testimony of Kempton Jenkins can not be used to establish a state of facts which were not proved, that is, those facts which would arise out of the processing of the Petitioner's Visa by the Vice-Consul in Wentorf.

CONCLUSION

Certiorari should be granted and the judgment of the Fifth Circuit Court of Appeals should be reversed and the Judgment of the District Court reinstated.

RESPECTFULLY SUBMITTED,

By Brian M. Gildea
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